Embossing Printers, Inc. *and* Local 263, Graphic Communications International Union, AFL–CIO.[1] Cases 7–CA–19268, 7–CA–19825, and 7–CA–20006

31 January 1984

DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 27 April 1983 Administrative Law Judge James L. Rose issued the attached decision. The General Counsel and the Union filed exceptions and supporting briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Embossing Printers, Inc., Battle Creek, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL not promise to grant benefits to employees if they do not select the Union in a Board-conducted election.

WE WILL NOT tell employees that they will not be promoted because the Union has been certified.

WE WILL NOT tell employees that they will not receive a pay raise because the Union has been certified.

WE WILL NOT imply to employees that they will receive benefits should they cease to support the Union.

WE WILL NOT tell employees that we will never sign the collective-bargaining agreement with the Union.

WE WILL NOT fail and refuse to grant wage increases to employees because of their support of the Union.

WE WILL NOT bargain directly with employees concerning their wages and other working conditions.

WE WILL NOT grant wage increases without prior notice to or negotiations with the Union.

WE WILL NOT unilaterally change contract language previously agreed to in collective-bargaining negotiations.

WE WILL NOT fail and refuse to meet with the Union at reasonable times and places to conduct collective-bargaining negotiations.

WE WILL NOT unilaterally change the wage rates.

WE WILL NOT prematurely effectuate a disciplinary system to which only tentative agreement had been reached in collective-bargaining negotiations.

WE WILL NOT fail to reinstate on request employees who are engaged in a lawful strike.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

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[1] The Graphic Arts International Union, the Charging Party in this case, and the International Printing and Graphic Communications Union merged, effective 1 July 1983, to form the Graphic Communications International Union.

[2] The Union has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Inasmuch as we adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by telling employee Hallerbach that the Respondent would never sign a contract with the Union, we find it unnecessary to pass on whether the Respondent made similar statements to a number of other employees, as any finding of a violation would be cumulative.

Similarly, inasmuch as we agree with the judge's finding that the Respondent unlawfully refused to meet with the Union after 1 October 1981, we find it unnecessary to pass on whether the Respondent violated Sec. 8(a)(5) by refusing to meet with the Union between 5 August 1981 and Labor Day 1981.

We adopt the judge's recommendation to dismiss the complaint's allegation that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally canceling the employees' Christmas bonus. In so doing, we do not rely on his misstatement that Mellema testified that the Respondent decided in June 1980 to cancel the Christmas bonus as part of a cost-cutting package and had so informed employees. Rather, we infer from the fact that the Respondent in June 1980 initiated cost-cutting measures such as cancellation of the Christmas party, elimination of athletic team sponsorships, and wage freezes that the Respondent also decided in June, before the Union's advent, to cancel the Christmas bonus.

Further, we adopt the judge's recommendation to dismiss the complaint's allegation that the Respondent made unlawful unilateral changes in the grievance and arbitration article of the contract being negotiated on the basis that there is insufficient "documentary" proof that the parties had agreed to the article in total or to the section where the Respondent had unilaterally added a new phrase.

[3] Inasmuch as the Respondent lawfully disciplined its first-shift employees for engaging in unprotected intermittent walkouts by locking them out, they had no preferential rights to be recalled.

WE WILL recognize and bargain with Local 263, Graphic Communications International Union, AFL-CIO, as the duly certified representative of a majority of our employees in the appropriate unit with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, WE WILL embody such agreement in a written, signed contract.

WE WILL meet with Local 263, Graphic Communications International Union, AFL-CIO, as the certified collective-bargaining representative of our employees in the appropriate unit at reasonable times and places to negotiate a collective-bargaining agreement.

WE WILL reinstate David Mann, Frank Roberts, Kenneth Hickman, David Sinclair, and Phillip Sajtar to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, and make them whole for any loss of wages, with interest, they may have suffered as a result of our failure to reinstate them upon request on or about November 1, 1981, if at that time they had not been replaced, or WE WILL reinstate them when a vacancy occurs.

WE WILL expunge from employees' personnel files any written warnings given them pursuant to premature implementation of the tentatively agreed-to disciplinary system.

WE WILL strike from any tentatively agreed-to contract clause that language which we unilaterally added.

EMBOSSING PRINTERS, INC.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: This matter was tried before me on various dates between September 7 and October 28, 1982, at Battle Creek and Marshall, Michigan. In brief, on December 5, 1980, Local 263, Graphic Arts International Union, AFL-CIO (the Union) was certified as the exclusive representative of certain pressroom employees of the Respondent.[1] In February 1981[2] the parties commenced negotiations for a collective-bargaining agreement. The principal spokesman for the Union was International Representative Stanley Wulkowicz, later joined by Director of Organizing Norman C. Warnke. The Company's principal spokesman was attorney Darrel D. Jacobs whose office is in Kalamazoo, Michigan, about 25 miles from Battle Creek. The parties had 15 negotiation sessions through August 5. While there was tentative agreement on several noneconomic items, a number of such issues remained and the parties did not discuss economic terms.

Thus on August 5 the parties met (with a Federal mediator) and exchanged "final proposals" for a noneconomic package. No agreement was reached, with the Union's negotiators taking the position that the Company's final proposal was even more "regressive" than previous proposals.

Immediately following the August 5 meeting, the union negotiators (the two International representatives, two officers of the Union who were not employees of the Respondent and four members of the bargaining unit) decided to have a meeting of all unit employees the next day. A note was drafted and distributed the next day at the plant, which reads: "To all lithographic department employees of Embossing Printers, Inc. A special meeting will be held on August 6, 1981 beginning at 9 a.m. The meeting will be held at the Village Inn. The purpose of this meeting is to discuss current contract negotiations. Your attendance is necessary."

On August 6, 11 first-shift employees clocked out at 9 a.m. and went to the meeting. They returned to work about 2 p.m. That evening at 7 p.m., four second-shift employees clocked out and also met with the negotiators. They also subsequently returned to work.

On August 6 it was determined to continue the employee meeting with union negotiators on August 7. Again the first-shift employees left work about 9 a.m. Upon their return they were given a written notice which was both read to them and then posted on the bulletin board:

WARNING

August 7, 1981

TO ALL EPI UNION BARGAINING EMPLOYEES.

This is a Formal Warning to inform you that the Company will *not* tolerate the "Walk-out" activities that you have been engaging. If this behavior continues the Company will take whatever action it deems appropriate.

At 9:30 a.m. on August 13 many of the bargaining unit employees again left work to have a meeting with union representatives. When they returned about noon, they were met at the gate by Ivan Mellema, the Company's vice president, who read the following statement:

August 13, 1981

Gentlemen,

You have been given sufficient warning regarding your quickie or intermittent "walk-out" activities. The Company strongly indicated that it would take whatever action it deemed appropriate, should these activities continue.

EPI cannot operate its business under such handicaps.

[1] The appropriate unit for purposes of collective bargaining within the meaning of Sec. 9(b) of the Act is:

All full-time and regular part-time lithographic employees, camero-lithographic employees, color lithographic employees, stripping lithographic employees, and pressmen employed by the Respondent at its Battle Creek, Michigan, facility, excluding office clerical employees, confidential employees, professional employees, guards and supervisors as defined in the Act and all other employees.

[2] All dates are in 1981 unless otherwise indicated.

> Therefore, effective immediately, all those employees who engaged in the "walk-out" activity on August 13, 1981, are no longer allowed on company property.

One of the employees asked if Mellema meant that they had been discharged and he replied they had not, but they should talk to their union representative. All of the first-shift employees who had walked out on August 13 assembled across the street and began picketing.[3]

Shortly thereafter, employees who had engaged in the walkout were joined on the picket line by four second-shift employees. The second-shift employees did not attempt to report for work on August 13 or thereafter. The same is also true of one bargaining unit employee who on August 13 was on vacation. On the day he was to return to work he instead joined the picket line.

The principal issue in this matter concerns the termination of employees on August 13. The General Counsel alleges that they were locked out in violation of Section 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. sec. 151, et seq. The Respondent contends that the walkouts of August 6, 7, and 13 were unprotected activity and therefore its treatment of the employees was not unlawful.

It is also alleged that the Respondent's refusal to allow employees to return to work on August 13, its refusal of their subsequent offer of reinstatement, and its replacement of them with new hires not only violated Section 8(a)(3) of the Act but was violative of its bargaining obligations under Section 8(a)(5).

Certain statements made by Mellema prior to the election, and by him and other supervisors subsequently, are alleged violative of Section 8(a)(1).

Although the General Counsel and the Union specifically disclaim that the Respondent engaged in surface bargaining, specific acts of the Respondent during negotiations are alleged violative of Section 8(a)(5). Finally, certain acts of the Respondent following the lockout are alleged violative of Section 8(a)(5).

The Respondent generally denied that it has committed any unfair labor practices and affirmatively contends that at all times it has bargained with the Union in good faith in an effort to reach a collective-bargaining agreement.

Upon the record as a whole,[4] including exhaustive briefs submitted by all counsel and my observation of the witnesses, I issue the following

Findings of Fact and Conclusions of Law

I. JURISDICTION

The Respondent is engaged in the business of a nonretail lithographic printer with its only facility in Battle Creek, Michigan. In the course of its business operations, the Respondent annually derives gross revenues in excess of $500,000; and annually purchases directly from outside the State of Michigan goods and materials valued in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Given the numerous allegations, the facts and analysis of each alleged unfair labor practice will be treated seriatim as it appears in the second amended complaint.

A. *The 8(a)(1) Allegations*

1. The November 24, 1980 speech

In paragraph 11(a) of the amended complaint, it is alleged that on November 24, 1980 (2 days before the election) Mellema spoke to employees implying that he would grant fringe benefits including medical coverage and cost-of-living allowance if they voted against the Union and he would not grant such benefits if the Union was voted in.

The fact that Mellema held a meeting with employees prior to the election is uncontested. In fact, the Respondent offered into evidence the speech which Mellema testified he gave to the assembled employees on November 24.

In rebuttal, however, Joseph Kleczynski testified that Mellema gave two speeches to employees prior to the election. One he read and is embodied in the Respondent's exhibit. The other he did not read from a prepared text. Mellema did not deny that he gave two speeches about the same time.

Kleczynski's testimony is generally credible and is undenied. Thus I must conclude that in fact Mellema spoke to employees on two occasions just prior to the election; and that his testimony concerning having read the speech refers only to the one meeting and not to the meeting about which the General Counsel's witnesses testified. The substance of Mellema's comments to employees as testified to by Kleczynski is:

> He said him and Vern had been talking and they had realized that they had made some mistakes in the past, but that they were willing to do some changing, and that they had looked into some new policies, dental, optical, cost of living and they said but their hands were tied right now on this; that something like this might come into effect after the first of the year.

And, Kleczynski testified that Mellema ended the meeting by saying, "vote for us."

William F. Roberts testified that Mellema started the meeting by stating:

> "I know what you fellows want. You are wanting health insurance, possible dental, cost of living increases and raises." He might have named a couple

[3] Company witnesses testified that the picket signs initially read "On Strike" while the General Counsel's witnesses all testified that the picket signs from the very beginning read "Locked Out."

[4] The Charging Party's motion to correct the transcript is granted.

other things; I can't remember for sure. And he said, "We are working on some of these programs but right now our hands are tied," or "my hands are tied."

And then he said a couple more things. I can't remember for sure what. At the end of it he says, "I am asking you to vote for me, not the union."

Other witnesses on behalf of the General Counsel testified to the same general effect—that in a speech to employees prior to the election Mellema indicated to employees that he understood what their concerns were and that he was working on them.

These comments by Mellema are alleged to have been violative of Section 8(a)(1) as being promises of improved benefits if the employees would vote against the Union. I conclude that the statements made by Mellema to employees prior to the election to the effect that he was working on their economic concerns but that his "hands were tied" along with a plea to vote for the Company in the forthcoming election in fact did tend to interfere with employees' Section 7 rights. Accordingly, he violated Section 8(a)(1) of the Act.

That Mellema may have given another speech to employees at about the same time which did not contain statements violative of the Act does not excuse his action.

2. The March 11 statement to an employee

It is alleged that on March 11 Mellema told an employee he would not be promoted because the Union had been certified. This was to have occurred in a conversation to which Kleczynski testified:

I was getting ready to punch out and go home and Ike Mellema was standing by the time clock. I asked him at that time, I said, hey, Ike, I said, how come you hired Dave Sinclair off the street when you promised me that job back in May of last year.

He looked at me and said, well, Joe, back in May of last year we didn't have an election for the Union in here.

At that time I reached over the time clock and grabbed a pencil and paper and wrote it down right in front of him. And I walked out.

This involved Kleczynski's repeated request of Mellema to be promoted from a two-color press which he was operating at the time to a four-color press, and the fact that Sinclair had been hired as an assistant on the four-color press.

Mellema testified that Kleczynski had asked on a number of occasions to be promoted to the large pressroom and specifically in March Kleczynski asked why he did not get the job. Mellema testified he had told Kleczynski, "Well, I'm sorry, Joe; things have changed. I am not in charge of personnel any longer."

Production Manager Dennis Briggs testified that he overheard this conversation. He stated that Kleczynski approached Mellema in Briggs' presence and asked why he did not get the job of running the large press.[5]

Briggs testified that the job had not yet been filled. And he further testified that Mellema said "that things had changed and that he was no longer in charge of Personnel."

In addition to the substance of the conversation, Kleczynski testified that he and Mellema were alone and that following Mellema's statement to him, Kleczynski wrote it down on a piece of paper which he produced on cross-examination, at the hearing. While the statement was not offered into evidence, it was read into evidence and is substantially identical to Kleczynski's testimony concerning what Mellema had said.

Documents submitted by the Respondent in connection with the negotiations show that David Sinclair was hired as an apprentice (or helper) on the four-color press on March 9. This is consistent with Kleczynski's testimony and contrary to Briggs' statement that the four-color job had not yet been filled. Further, Mellema did not indicate in his testimony that Briggs was present during the conversation between him and Kleczynski on or about March 11. Thus I discredit Briggs.

Though not free from doubt, on balance I conclude that the conversation more probably occurred along the lines testified to by Kleczynski than by Mellema. Mellema's testimony that he told Kleczynski that things had changed and he was no longer in charge of personnel seems unlikely. At the time Mellema continued to be in charge of production and directly involved with the assignment of individuals to particular presses. His testimony indicates that he was in fact involved in the hiring of Sinclair as a helper on the four-color press. Thus, notwithstanding that others had input into the hiring and promotion decisions, I believe that Mellema retained substantial authority in this area. Hence, he would not likely have brushed off Kleczynski in the manner to which he testified.

There is no evidence that Kleczynski was thought incapable of working on the four-color press or was less capable than Sinclair. And finally, in the Respondent's ongoing dispute with the Union, Kleczynski was one of principal participants on behalf of the Union. Thus I believe that the changed circumstance referred to by Mellema was the Union's certification. And, absent this activity, Kleczynski would have been promoted to the four-color press, although the evidence does not indicate that such would have meant more money for Kleczynski at that time. In any event, I conclude, as alleged, that the Respondent told an employee that he was not promoted because of the employee's union activity. Such necessarily interfered with employees' Section 7 rights and was violative of Section 8(a)(1) of the Act.

[5] The Respondent had two large presses, one four-color and one five-color. Although there is undenied testimony that Kleczynski was physically incapable of being a helper on the five-color press because his size would prohibit him getting under it, there was no such restriction to his working on the four-color press. This was apparently the press that was under discussion.

3. The March 20 statement to an employee

It is alleged that on or about March 20 Mellema told Kenneth Hickman that he would not receive a pay raise because of the employees' union activity. This conversation, according to Hickman, took place a few days after Hickman had been made the lead pressman on the five-color press on the evening shift. He asked Mellema if he would get the pay of the number one pressman on the five-color press. Mellema responded, "I'll be fair." Then about 2 weeks later, Hickman again asked Mellema if he was going to get the raise. Mellema stated, "You take care of the situation and I'll take care of you right now." (What this comment was supposed to have meant is unexplained in the record or on brief.) Hickman went on to testify that he showed Mellema at least one job he had run to prove that he was qualified as the number one pressman on the five-color. He testified that Mellema finally said, "Just blame the Union for that." Mellema told Hickman that he would have to talk to his union representatives and that his hands were tied.

Mellema testified that Hickman asked him on several occasions for a raise and that he said, "Sorry, Kenny, there is nothing that I can do. You'll have to talk to Jerry Barrick [the then General Manager]." Mellema denied telling Hickman that the reason he would not get a raise was because of the Union. However, Mellema did not deny that sometime between January 20 and June 11 (the dates of the two employee classification rosters submitted by the Company) Hickman was designated as relief pressman on three presses including the five-color. The June 11 document shows that Hickman was not receiving the full pay rate for a five-color pressman.

Since the Respondent had given pay increases to a number of employees who were promoted, infra, given Hickman's uncontroverted testimony that in fact he assumed duties of the evening shift five-color pressman in March but was not paid the commensurate rate, I conclude that in fact the Respondent denied Hickman a pay raise to which he reasonably would have been entitled.

In view of this, I conclude that Mellema more likely than not would have told Hickman that the reason he was denied the pay raise was because of the union activity. Such being the case, I believe that Mellema's statement to Hickman concerning why he had been denied the increase interfered with employees' Section 7 rights and was violative of Section 8(a)(1) of the Act.

4. The April 21 statement to an employee

It is alleged that about April 21 Supervisor James Buchino told employee David Mann that he would not receive a pay raise because of certification of the Charging Party. And it is alleged, infra, he was denied a wage increase at this time. However, it is also alleged, infra, that on April 18 the Respondent unilaterally and in violation of Section 8(a)(5) granted wage increases. A wage increase to Mann was established to prove this allegation.

The parties are in agreement that Mann was an apprentice photo-mechanical operator and prior to April was working on the day shift when his supervisor, Buchino, asked him to go on the night shift. According to Mann he was put on nights generally against his will. He asked Buchino if he would get a raise for going on nights, and Buchino said "that if it wasn't for my involvement with the Union he said I would have had a good raise by now."

After Mann went on nights, he received a night shift differential of 51 cents and also a pay increase of $1.09 from $4 to $5.09 per hour. The other three employees in his classification were at $5, $6.25, and $6.50 at the time. Thus Mann's pay increase put him more in line with the others in his classification. Nevertheless, Buchino testified that the increase was a mistake and that Mann should not have gotten it because since 1980 wages had been frozen. Buchino further testified that Mann was deserving and that but for the freeze would have received an increase. Thus when he discovered the error, he did not advise the payroll office to rescind it.

Buchino denied having told Mann that he would not, or did not, receive the pay increase because of his involvement with the Union. Buchino also testified that there had been a wage freeze in effect since June 1980 and that he, in fact, had not received a wage increase since going from $11 per hour to $12.25 in early 1980. However the Respondent's records show that Buchino received the raise to $12.25 on or about April 1, 1981, substantially after the date of the alleged freeze and during the same general period when the events concerning Mann occurred.

Buchino's testimony that Mann's raise of $1.09 an hour, in addition to the 51-cent-per-hour night-shift differential, was a mistake is simply not credible. While it is possible for payroll departments to make gratuitous changes in pay rates, such is unlikely. It is further unlikely that, when brought to his attention, a supervisor would not have undertaken to have such a change rescinded even believing the employee in question deserved it, if in fact there was a companywide wage freeze. For these reasons, I do not credit Buchino.

Given the parties' continuing negotiations for a collective-bargaining agreement and the undenied fact that Mann asked Buchino for a wage increase, I believe it very likely that Buchino would have responded that Mann had not had a wage increase because of the union activity. Notwithstanding that Mann subsequently did in fact get a raise, I conclude that, in substance, Buchino told Mann something to the effect that he did not receive a wage increase because of the union activity and that Buchino thereby made a statement violative of Section 8(a)(1) of the Act.

5. The April implied promise

It is alleged that in April Mellema made an implied promise of a benefit to an employee if he would cease to support the Union. This allegation concerns a conversation Mellema had with employee Charles Hallerbach about 10 days after Hallerbach had been promoted from the 30-inch two-color press to a 40-inch two-color press with a pay increase of $2 per hour. The promotion was occasioned by the transfer of the 40-inch two-color pressman to the night shift.

About 10 days after this, Mellema told Hallerbach "that the company would be fair to me without a

union," referring to the situation that he was in. "I got a nice raise and a promotion. I moved up to larger equipment which I wanted to do. And like I say, he [Mellema] said to me, 'the company, you know, you work with us and we will work with you.' He said to me, I think his exact words were, 'so you don't need a union, we took care of you.'" This testimony was undenied and given Hallerbach's generally credible demeanor, I conclude that it occurred in substance as he testified.

The Respondent argues that even if the statement occurred, inasmuch as the Union had been certified some several months previously, such could not have been violative of the Act; and in any event, even with union certification, an employer is entitled to continue to run its business.

However, during the course of difficult and slow collective-bargaining negotiations such a statement to an employee who had just been promoted suggests that all benefits would come from the Company without participation of the bargaining agent. Such necessarily would tend to undermine the authority of the bargaining representative and therefore interfere with employees' Section 7 rights. Accordingly, I conclude that, as alleged, Mellema violated Section 8(a)(1) of the Act.

6. The April anticipatory refusal to bargain

During the conversation with Mellema about which Hallerbach testified, supra, Hallerbach said that he was in favor of the Union not only for money but for job security and other benefits. Mellema responded, "you might have a union, but you will never have a damned contract."

Again, Mellema did not deny having made such a statement to Hallerbach. Clearly such amounted to an anticipatory refusal to execute a collective-bargaining agreement and necessarily interferes with employees' Section 7 rights, particularly in the context of protracted negotiations. I therefore conclude that Mellema in fact did violate Section 8(a)(1) of the Act as alleged in paragraph 11(f).[6]

7. The June threat by Buchino

It is alleged that in June Buchino made an implied threat to employees concerning picketing in case of a strike. This is alleged to have occurred in a conversation between Buchino and Mann. Mann testified that Buchino asked if he thought there was going to be a strike, "I told him, I said, 'Well, it all depends on whether or not we get a contract or how things go.'" Mann went on to testify that "in a higher tone of voice he says 'I hope I don't see you out on the picket line.'" That Buchino made such a comment to Mann is undenied, and given Mann's generally credible demeanor, I find that such occurred in substance as he testified.

However, I do not believe that such a statement can be construed as a threat against employees for engaging in protected activity. At best it is an ambiguous statement which could as easily have implied to the employee that the supervisor hoped there would be no strike and picketing. I conclude that Respondent did not violate Section 8(a)(1) of the Act as alleged in paragraph 11(g) of the complaint.

B. *The Refusal to Grant Wage Increases*

It is alleged in paragraph 12 of the second amended complaint that Mellema failed and refused to grant wage increases to Kleczynski on March 11; Hickman on March 20; and Mann on April 21. It is further alleged that each refusal was because employees had engaged in union activity and to discourage such activity. Thus each was violative of Section 8(a)(3) of the Act.

As set forth above, in March a new employee was hired as an assistant on the four-color press in favor of promoting Kleczynski to that position. Mellema told Kleczynski that the reason he was not promoted, in effect, was because the employees had selected a union as their bargaining representative. This was violative of Section 8(a)(1) of the Act. The Respondent's failure to promote Kleczynski, who was apparently qualified to perform the work (there being no testimony to the contrary) under these circumstances necessarily was caused by the employees' union activity and was therefore violative of Section 8(a)(3). Accordingly, I conclude that, by failing to promote Kleczynski to the four-color press on or about March 11, the Respondent violated Section 8(a)(3) of the Act. However, whether the Respondent thereby failed to grant him a wage increase as alleged in paragraph 12 of the complaint is another matter.

A review of the classification roster as of June 11 shows that Sinclair was being paid at the hourly rate of $5.45 plus a 55-cent-per-hour night differential. Kleczynski's hourly rate was $6. Thus, while I conclude that Kleczynski should have been assigned to the four-color press, on the state of the record before me, it does not appear that he was denied a wage increase as alleged in paragraph 12 of the complaint or, if he was, how much the increase would have been.

It is also alleged that Hickman and Mann were denied wage increases. However, in paragraph 16(c) of the complaint, infra, it is alleged that the Respondent unilaterally granted wage increases in violation of Section 8(a)(5) of the Act. Wage increases to these individuals were offered to prove that allegation. I do not believe that the same event can be both a denial of a wage increase and also a grant of a wage increase. The June 11 classification roster and their testimony show that Hickman and Mann in fact received wage increases between January and June. Hickman from $8.75 per hour to $9.98 and Mann went from $4 to $5.09 per hour. The testimony indicates that these increases were about the time it is alleged they were denied increases.

[6] There is testimony concerning an incident which occurred in March when Robert Woomer, the president of another local union of the Graphic Arts International Union, called Mellema, at the request of Warnke. Woomer told Mellema the call was in response to a newspaper ad for employees. Woomer testified that Mellema said, "the union had been recently certified, and they were presently negotiating a contract, but he wasn't about to sign the contract." It is argued that this testimony also supports the allegation in par. 11(f). However, Mellema's statement was not directed to an employee or even to a bona fide applicant. Woomer was clearly not an employee within the meaning of the Act. In any event, an additional finding of the violation of par. 11(f) would be redundant.

In short I conclude that factually it has not been established that the Respondent denied wage increases to Kleczynski, Hickman, or Mann. However, the denial of a promotion to Kleczynski was fully litigated and was fairly within the ambit of paragraph 12 of the amended complaint. Thus I conclude that, as to Kleczynski, the allegation has been sustained and that the Respondent did on or about March 11 violate Section 8(a)(3) of the Act by denying a promotion to Joseph Kleczynski.

C. *The Refusal-to-Bargain Allegations*

As noted above there is no contention by the General Counsel or the Union that the Respondent's general course of conduct during negotiations was calculated to frustrate the bargaining process. There is no contention that the Respondent entered into negotiations with the purpose not to arrive at a meaningful collective-bargaining agreement. Rather, the General Counsel and the Union contend only that in certain specific respects the Respondent breached its bargaining obligations.

1. Unilaterally eliminating a Christmas bonus and company sponsored Christmas party

It is alleged that in or around December 1980 without bargaining with the Union, which at that time had been certified as the employees' collective-bargaining representative, the Company eliminated its past practice of giving employees a Christmas bonus and sponsoring an admission free Christmas party.

The Respondent admitted that it did eliminate the 1980 Christmas party and Christmas bonus and did not bargain with the Union about these matters. However, the Respondent contends its decision was made in early June 1980 and well before the Union even began its organizing campaign. The Respondent contends that canceling the Christmas party and Christmas bonus was part of a package of cost cutting measures initiated to stem the substantial losses the Company had suffered during the first half of 1980.

The General Counsel and the Union rely on the testimony of William Roberts, Jack Righter, and Joseph Kleczynski, all of whom testified that they were not aware that the Company had determined to cancel the Christmas bonus and Christmas party until about or after Christmas 1980. Specifically, Kleczynski testified that he recalls a meeting in June 1980 at which Mellema discussed the economic problems of the Company but nothing was said then about the Christmas party or Christmas bonuses being canceled.

On the other hand, Mellema testified that in June 1980, at a meeting with all employees, the decision to cancel the Christmas party and Christmas bonus was noted along with other cost savings, including the elimination of athletic team sponsorships, the possibility of a wage freeze for employees as well as management, and a 25-percent cut in salary for himself and the president of the Company.

The Respondent offered into evidence letters written on June 27 and June 30, 1980, by the Respondent's receptionist, Molly Cahill. One was to the hotel where the party was to be held stating that "due to unforeseen circumstances, E.P.I. will not be hosting its Christmas party at the center this December." The other letter canceled the Moonlighters (apparently a dance band). On July 15, Cahill received an acknowledgement from the Kalamazoo Hilton Inn.

Thus, the testimony of Cahill along with the uncontroverted documentary evidence establishes that in fact the Company had determined to cancel the Christmas party sometime before June 27, 1980. Even accepting the testimony of the General Counsel's witnesses concerning when they were notified the party was canceled, the Company's decision, occurring as it did prior to the employees having selected the Union as their bargaining representative, could scarcely have been violative of Section 8(a)(5) of the Act.

In addition, I conclude that the documentary evidence and the testimony of Cahill corroborate Mellema's testimony that the Company decided on a number of cost-saving measures to be implemented in or about June 1980 including also cancellation of the Christmas bonus. Again, whether this decision was in fact communicated to employees (which I believe it was) or not is immaterial. The issue is whether or not the Company made a unilateral decision in derogation of the bargaining representative of its employees. I conclude, in fact, the decision to cancel both the Christmas party and the Christmas bonus was made well before the employees selected the Union as a bargaining representative and therefore the Respondent did not as alleged in paragraph 16(a) violate Section 8(a)(5) of the Act. I will recommend that this allegation be dismissed.

2. Bargaining with employees

It is alleged that since April 18 the Respondent has bargained directly with employees concerning their wages and other working conditions. This allegation involves the undisputed wage increases awarded to three pressmen in April and May.

According to company records, as of January 23, the base rate of Frank Roberts was $10 per hour, of Charles Hallerbach $8 per hour, and of Kenneth Hickman $8.75 per hour. Each of these individuals received a pay increase in April or May such that, exclusive of any night-shift differential, Roberts went to $12 per hour; Hallerbach to $10 per hour; and Hickman to $9.98 per hour. These wage increases are undisputed. It is also undisputed that the Respondent bypassed the Union in awarding them. And finally, it is undisputed that the wage increases were associated with some change in duties of the employees.

Thus Roberts became the pressman for the 40-inch four-color press. Hallerbach went to the 40-inch two-color press, and Hickman became the relief five-color pressman on the night shift, where before he had been an apprentice on the five-color. The Respondent maintains that inasmuch as each of these individuals received a promotion, the resultant wage rate in accordance with established company practice did not involve individual bargaining or a violation of Section 8(a)(5) of the Act.

Frank Roberts, for instance, was asked by management to go on the night shift primarily as the 40-inch four-

color pressman. He told management officials that he would be interested "if the money was right." He testified, "The company offered me $11 an hour plus 10 percent for night shift premium and I turned it down." Then a couple days later he met again with General Manager Barrick and was asked what he wanted. "I told them $12 per hour plus 10 percent night shift premium." Roberts did in fact go on the night shift as the 40-inch four-color pressman at $12 per hour plus $1.20 per hour night-shift premium.

His testimony is undisputed. Rather than having been automatically awarded a standard pay rate based on new specific job responsibilities, Roberts' base rate as a 40-inch four-color pressman was negotiated between him and management. Such bypassed the bargaining representative.

When Hickman was assigned to be the five-color relief pressman on the evening shift he approached management asking for more money for this additional responsibility and ultimately got the pay raise noted. Hallerbach simply received a $2-per-hour pay raise when he was transferred to his new job of running the 40-inch two-color press.

The Respondent maintains that the wage increases were simply in keeping with its past practice of assigning a specific rate for specific duties. Even if there were discussions between the employees and management concerning their respective promotions, nevertheless the wage increases followed past practice. Therefore, the Respondent did nothing in derogation of the bargaining representative of the employees.

A review of the documents submitted by the Company concerning the job duties and pay rates of employees as of January 23 and June 11 show that there is a wide variance in the pay rate for pressmen. The rate appears to be primarily a function of the size of the press and the number of colors. The smaller the press and the fewer the colors the less the rate.

However, it is noted that on January 23 Hallerbach was classified as a 30-inch one-color and 30-inch two-color pressman as was Paul LaHuis. Hallerbach's rate was $8 per hour and LaHuis' $9.50. This differential was not explained on the record and is not apparent from the document. It was not, however, based on seniority inasmuch as Hallerbach had been employed nearly 5 years longer than LaHuis. The point is, within a broad range from $6 to $12 per hour, the Respondent assigned the pay rates for the pressmen without any apparent set standard. I reject the Respondent's argument that it simply went about its business, making necessary promotions and then assigning a predetermined pay rate. The documentary evidence simply does not support the Respondent's contention.

Accordingly, I conclude that the Respondent did bargain directly with employees concerning wage rates and other working conditions and thus violated Section 8(a)(5) of the Act. I shall recommend that it cease and desist therefrom; however, in accordance with Board policy, I shall not recommend that the wage rates awarded to the employees in question be rescinded.

3. Unilateral grant of wage increases

It is alleged that the Respondent also unilaterally granted wage increases without bargaining with or prior notice to the Union. This allegation apparently refers to the David Mann situation, supra.

As noted, Mann was put on the night shift, and in addition to receiving the night-shift differential (which was standard company policy) he also received a gratuitous $1.09 wage increase which his supervisor testified was apparently a bookkeeping mistake which he allowed to stand. Both Mann and Buchino testified that upon discovering the wage increase, Buchino told Mann that he could keep it and that he deserved it. The justification for this, according to Buchino, was that wages had been frozen and that Mann had not received any wage increase though performing at a higher than entry level.

However the wage increase may have come about, it is clear that the Company gave it to Mann without negotiating with the Union and that it was granted to him during the course of collective-bargaining negotiations. Wages of course are a mandatory subject of bargaining. Unilaterally granting an employee a wage increase, however justified it may be, necessarily tends to undermine the authority of the bargaining agent and is necessarily violative of Section 8(a)(5) of the Act. As with the unlawfully negotiated wage increases, I will order the Respondent to cease and desist from such activity, but I will not recommend that the wage increase given Mann be rescinded.

4. Prematurely and selectively implementing a disciplinary system

It is alleged that in May the Respondent put into effect a disciplinary system the parties had only tentatively agreed to in negotiations. It is also alleged that the Respondent put into effect this system on a selective and discriminatory basis.

During the course of negotiations, the parties discussed a clause entitled "Disciplinary Procedures." According to documentary evidence, on April 30 negotiators for both parties initialed the Union's proposal as having been tentatively agreed to. In essence, the article set forth a progressive discipline system for unsatisfactory attendance or work performance. Shortly thereafter, according to the unrefuted testimony of Hickman, Kleczynski, Righter, and Roberts, the Company began issuing warnings to employees for substandard work performance (Hickman, Kleczynski, and James Angel) and for tardiness (Kleczynski, whose warnings were revoked, Edward Pokojski, and Roberts).

While there is no evidence that the disciplinary warnings were given only to union adherents, there is no question that various supervisors did begin giving warnings to employees for tardiness and poor work performance.

The General Counsel and the Union contend that such was implementation of only a tentatively agreed-to contract clause and thus amounted to unilateral action on the part of the Company. At the beginning of negotiations the parties agreed that any agreements would be

tentative until such time as an entire contract was agreed to.

The Respondent does not dispute this but rather takes the position that implementation of the progressive system was simply a "disciplinary dress rehearsal" which everyone understood. That is, according to the Respondent's argument, inasmuch as the parties agreed to a progressive system of warnings, the Company began to issue warnings in order to get employees used to the idea that they would receive warnings for tardiness and substandard work performance. It is contended that the warnings otherwise had no meaning. There is, however, no evidence to support the Respondent's argument in this respect. Rather, the overwhelming evidence is that in fact on numerous occasions the Respondent issued written warnings to employees. Even though no one's tenure was affected, nevertheless employees were disciplined and the warnings are apparently still in the employee personnel files.

The parties had agreed to a progressive discipline system. However, the Company began issuing warnings to employees without approval of the Union during the course of negotiations and before the rest of the contract was agreed to. Such amounts to a unilateral act and was therefore violative of the Respondent's bargaining obligations.

I therefore conclude that the Respondent did prematurely and in violation of Section 8(a)(5) of the Act implement an employee discipline system. I shall recommend that it cease and desist therefrom and expunge from employees' personnel files any written warnings given them pursuant to the implementation of that system.

5. Course of bad-faith bargaining from February 2 to August 5, 1981

In addition to the specific acts discussed above in this section, it is also alleged that in certain respects during negotiations the Respondent engaged in specific acts of bad faith.

a. *Refusing to bargain about union security and/or dues checkoff*

It is alleged that on July 16 Respondent refused to bargain with the Charging Party concerning union security and dues checkoff.[7] According to the testimony of Wulkowicz and Warnke the only meeting at which the matters of union security and dues checkoff were discussed was on July 16. Wulkowicz testified:

> Well, there was quite some discussion on the union shop clause and security (as the transcript should read) and Mr. Jacobs stated that it is against the company's principles to address such an article. If the people want to join a union that is their prerogative and we are not going to force them into it. We tried to tell them that there was a certification granted on behalf of these people, they made their choice and they want to be represented, and the Employer's principle is that he is opposed to a person joining if he doesn't wish to.

With regard to dues checkoff, Wulkowicz testified that Jacobs said that the Company was not going to act as a collection agency.

Warnke's testimony is similar. He testified that on July 16 Jacobs said the Company would not agree to any form of union security or dues checkoff. The testimony of Wulkowicz and Warnke was substantially corroborated by Richard Pratt. He testified the Company rejected union security because it "wasn't part of company policy." And the Company would not be a collection agency.

In sum, at only one meeting were the Union's proposals for standard union shop and dues checkoff discussed. At that time the Company stated it would not agree to either. There was discussion but these matters were not again taken up, though the Union proposed their inclusion on August 5.

The fact that one party or the other may state that it will not agree to a particular clause is not sufficient to support a finding that it thereby refused to bargain over that issue. Proposal and rejection of an article on one occasion during the course of protracted negotiations, where the parties are still far apart on many items, does not imply that continued discussion would be futile. At best, the General Counsel established the preliminary position of the Company to be opposed to union security. Such does not mean that had agreement been reached on the rest of the contract the Company would not have consented to some type of union security.

Nor from the testimony of the General Counsel's witnesses can it be concluded that the Company refused to discuss the matter. In fact there was discussion. Of course, the Company was not ever compelled to agree to a union security or checkoff clause. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). Accordingly, I conclude that the Respondent did not as alleged in paragraph 16(e)(1) refuse to bargain with the Charging Party concerning union security and/or dues checkoff. I shall recommend that this paragraph of the complaint be dismissed.

b. *Unilateral alteration of previously agreed-to contract language*

It is alleged that on May 20 and thereafter the Respondent made certain changes in the language the parties had tentatively agreed to in the clauses covering insurance for laid-off employees, training for employees on new equipment, and the grievance procedure.

The undenied testimony of Wulkowicz is that the parties agreed that when the language of a particular clause had been agreed to, it would be initialed and would no longer be open for discussion, subject only to final approval of the entire contract. How this was done varied somewhat since there were numerous clauses, proposals, and counterproposals. Basically, however, when one party would agree to the language of the clause, the chief negotiator would initial and date the clause along with whatever additional language had been written in

[7] Both the General Counsel and the Charging Party on brief contend also that the Respondent's refusal to bargain about an apprenticeship clause was unlawful. However this was not alleged in the second amended complaint.

and submit it to the other side for initialing. And, from time to time the proposals as agreed to would be typed.

Although counsel for the Respondent argues that in its original proposal of February 19 it reserved the right to "add to, delete from, change or modify any and all proposals" during the course of negotiations, he did not dispute the Union's contention concerning the rules under which the negotiations would proceed—upon reaching a tentative agreement, both parties would initial the agreed to language and such would not be further changed or discussed until the final proposal was considered.

The Union submitted a clause concerning installation of new machines and processing. This subject was not addressed in the Company's initial proposal. In any event, following discussion of this matter, on April 30 Jacobs and Wulkowicz both initialed as tentatively agreed to the Union's "New Machines or Processes" proposal with certain additions and deletions of language.

On May 20 the Company presented a "clean" typed version of its proposed contract which included those clauses agreed to. That document contained the following language which had not been included either in the clause initialed by Jacobs and Wulkowicz or even in the Respondent's proposal of April 28: "This shall not mean the Company must keep an employee on said job for any period of time after the Employer determines the employee cannot be fully trained to satisfactory perform the job."

This language was added by the Company after agreement. Since it appeared to be substantive and since adding it was clearly unilateral, I must conclude that the Respondent thereby attempted to insert language to which the Union had not agreed. Nor on these facts can such be passed off as a mistake. There is too much a change in substance for it to be accidental. I conclude that by adding this language, the Respondent engaged in an act of bad faith during the course of negotiations and thereby breached its obligations under Section 8(a)(5) of the Act.

In the April 30 meeting, the parties agreed to a clause which defines an employee's rights in the event of layoff. Inter alia, the parties agreed to the following: "Continue to remain eligible to participate in Company insurance programs as outlined in this Agreement *for a period of twelve (12) months at no cost to the Company.*" (The italicized portion was added in pen although the words "for a period" had been struck.)

The Company's "clean" draft of May 20 has the following language: "Continue to remain eligible to participate in Company insurance programs as outlined in this Agreement for a period of up to twelve (12) months at no cost to the Company."

The General Counsel and the Charging Party argue that the inclusion of the words "up to" was a unilateral alteration of an agreed-to provision of the contract and amounted to a substantive change. Thus the Respondent was guilty of bad faith in negotiations.

No doubt the words "up to" had not been included in the agreed language. Again the words appear substantive, suggesting that a laid-off employee would not have an absolute right to continue to participate for 12 months.

Though Jacobs readily agreed on May 20 to strike the words "up to," including them in the first place I conclude was an act of bad faith in negotiations. Adding something which had not been in any of the earlier drafts was scarcely a mistake.

Finally it is contended that after agreeing to the grievance and arbitration clause, Jacobs surreptitiously added "in a court of competent jurisdiction within ten (10) working days of the date of said decision."

Wulkowicz and Warnke testified that after this particular section had been initialed, Jacobs wrote in the additional words. However, a comparison of two Xerox copies of the April 30 working draft show that on both the complained-of language is written in. One is initialed by Wulkowicz but the other is not. Such suggests that the addition was made before Wulkowicz affixed his initials. Thus, I discredit his contention that Jacobs added the words after agreement.

The Union also contends that following the April 30 meeting, Jacobs added three additional sections to the grievance and arbitration clause which the parties had not agreed to or even discussed on April 30. While it is true that there are three additional sections in the Company's May 20 proposal, I note that Wulkowicz initiated only language changes. There is no documentary indication that the clause was agreed to in total. Therefore, I do not believe that by adding additional sections the Respondent sought to alter its agreement with the Union.

In sum, I conclude that the Company did in fact add substantive language to two clauses which the parties had agreed to and in doing so it breached its bargaining obligations under Section 8(a)(5) of the Act. I shall recommend that it cease and desist from doing so and if it has not already agreed to strike those provisions from the tentative agreement that it do so.

The Union further contends that the Respondent unilaterally included in the contract work rules which the parties had agreed to but which they had also agreed not to include in the contract. Even if the testimony of Wulkowicz and Warnke is credited as to this, it has not been explained how the change was of any substance. The Union claims it agreed to work rules which would be referred to in the contract but would be published as a separate document. Having agreed to the rules, where they would be placed would seem of no importance.

In any event, I note that the Union's August 5 proposal includes the work rules as an article. Notwithstanding Warnke's apparent testimony to the contrary, I cannot accept that the Union's inclusion of the rules in its final proposal was a "secretarial mistake." I do not believe the placement of the rules was agreed to or was substantive. But even if the Union thought it had an agreement the work rules would not be in the contract, it acquiesced by including them in its proposal. I conclude the Respondent did not breach its bargaining obligations in this particular respect.

c. *Refusal to meet between June 16 and July 16*

It is alleged that at the June 16 meeting the Respondent claimed it could not meet again for at least a month because one of its negotiators had scheduled a vacation. The General Counsel relies on the testimony of Wulkowicz to support this allegation. In answer to why there were no meetings between June 16 and July 16 Wulkowicz stated:

> A. Because we were told that Mr. Barrick was going to be on vacation.
> Q. And who told you that, to the best of your recollection?
> A. It was mentioned at the table.
> Q. And who told you that, to the best of your recollection?
> A. It came from the company's side.
> Q. You don't recall who said it?
> A. No.
> Q. Okay.

Earlier Wulkowicz testified that either Jacobs or Barrick was going to go on vacation for a month. In fact, neither Jacobs, who had planned a trip from June 30 to July 26 which was canceled, nor Barrick was on vacation during the period from June 16 to July 16. Wulkowicz' testimony was not corroborated by his contemporaneous assignment reports. Thus the report of the June 16 meeting states: "At 9:45 p.m. the Commissioner (Curry) remarked that due to the lack of progress we should adjourn this meeting and that he would call the next meeting and hopefully we could start movement on both sides." There is nothing in this report suggesting a delay in meeting again until July 16, or for any other date. Rather, the import of this report is the meeting of June 16 was adjourned subject to the call of Commissioner Curry.

Then, in his report of the July 16 meeting, Wulkowicz noted that the Commissioner said the Company would be willing to meet on August 5: "We almost fell out of our chairs because (1) Jacobs was suppose to take a 4 to 6 week vacation starting July 20, 1981 and . . . ."

Notwithstanding Wulkowicz' testimony to the apparent contrary, I do not believe the vacation of a company negotiator caused delayed bargaining. I conclude that the matter of Jacobs taking a 4-week trip to Europe beginning in late June was discussed with the Union, but since it was canceled, such did not cause the delay between June 16 and July 16.

Rather, I conclude that the month delay was occasioned by the fact that the Commissioner did not believe a meeting would be productive. Accordingly, I conclude that the General Counsel did not establish by a preponderance of the credible evidence the facts alleged in paragraph 16(e)(3) and I will recommend that this paragraph of the complaint be dismissed.

In reaching this conclusion, it should be noted that I do not credit Kleczynski's testimony that at the end of the June 16 meeting, "Darrel said they couldn't meet for another month because Gerry Barrick was going to be on vacation." His testimony is not consistent with the notes of Wulkowicz or the other credible evidence.

d. *Late arrival at bargaining sessions*

It is alleged that the Respondent's representatives arrived an average of 45 to 60 minutes late to almost every collective-bargaining session. The testimony of the General Counsel's witnesses on this subject was at best general and conclusionary. Better evidence of how many times and to what extent the company negotiators were late is in Wulkowicz' assignment reports. In some reports he indicates when the meeting started and in others he does not, suggesting that on those occasions the meeting started at approximately the time scheduled. In reviewing Wulkowicz' reports, no tardiness appears for the meetings of February 20, April 30, May 20 and 27, June 16, July 16, or August 5. (The Union contends that the Company was late 1 hour and 20 minutes on August 5, however, there is no indication how this was arrived at.) The company team was late 10 or 40 minutes on March 31, depending on whether the meeting was to start at 4 or 4:30; 20 minutes late on March 5; 20 minutes late on April 2; 18 minutes late on April 14; 30 minutes late on April 16; indeterminate lateness on April 28; and 40 minutes late on June 3.

The record establishes, and the Respondent does not really contest, that in fact on some occasions its negotiators were late to bargaining sessions. The Respondent does contend that on many occasions its bargaining team would wait in the lobby of the motel until the union negotiators would advise that they were ready to meet. Notwithstanding, I am satisfied that in fact the Company did occasionally arrive late for bargaining sessions.

However, I do not believe that the established tardiness was significant or established bad faith in negotiations. It is noted that Jacob's office is in a town about 25 miles from Battle Creek. It is further noted that the negotiating sessions normally lasted 3 to 4 hours or more. Thus, short delays in starting some sessions would not reasonably be expected to affect the bargaining process. Habitual tardiness may be discourteous, but on these facts it was not unlawful.

I therefore conclude both that the General Counsel did not factually establish the allegation in paragraphs 16(e)(4) nor was the Respondent's proven lateness violative of Section 8(a)(5). Accordingly, I will recommend that paragraph 16(e)(4) of the complaint be dismissed.

e. *Adjourning bargaining sessions prematurely*

It is alleged that on March 31 and again on June 3 Jacobs walked out of and prematurely adjourned collective-bargaining sessions. The parties are in general agreement concerning the facts surrounding this allegation.

According to the testimony of Warnke, after the parties had met on March 31 for some three or more hours the meeting ended "by Mr. Jacobs saying that we have met long enough. He said I think we have accomplished all that we are going to accomplish tonight, rewrite some of your proposals and we'll see you on the 2nd of April. I said do you always meet for three or four hours and he said that's all I'm meeting tonight."

Wulkowicz' notes show that the union negotiators returned from a caucus with Warnke saying he would rewrite some of the language. It was then when Jacobs

said, "Well, its getting late and you have enough to rewrite." He testified the meeting adjourned, "so that we could get a chance to digest the articles proposed. That was the excuse to adjourn early, I guess."

Although not alleged as a violation, Jacobs also broke off the meeting of May 27 when, according to Warnke's admission, he called Jacobs a "no good, rotten, square headed son-of-a-bitch."

Warnke and Wulkowicz both testified that on June 3, following negotiations for about 3 hours, Jacobs and Warnke got into an argument over the suspension or discharge clause. Jacobs picked up his papers, put them into his attache case, and said something to the effect that when the union negotiators were ready to cool off, they could resume meeting. And he left.

On these essentially undisputed facts, the General Counsel alleges that the Respondent thereby violated its obligations to meet at reasonable times and places and bargain in good faith. I do not believe that the General Counsel factually sustained this allegation.

All the meetings lasted at least 3 or 4 hours—not an unreasonable period of time (although negotiation sessions sometimes go to exhaustion). Further, the end of the March 31 meeting was occasioned by the fact that the Union needed time to rewrite some language. The May 27 and June 3 meetings were adjourned by Jacobs following strong words directed at him by Warnke. Without assigning blame for these confrontations, it is clear that Warnke was a willing participant. The Union must share responsibility with the Respondent for the meetings having reached the point where further discussions at the time would have been futile.

I conclude that the General Counsel has not established by a preponderance of the evidence that the meetings of March 31 or June 3 were adjourned in violation of the Act. Accordingly, I shall recommend that paragraph 16(e)(5) of the complaint be dismissed.

f. The 8(a)(1) conduct as violative of 8(a)(5)

It is alleged that the Respondent violated Section 8(a)(5) by engaging in the unlawful conduct set forth in paragraphs 11 through 15 (the 8(a)(1) allegations, the lockout of August 13 and the refusal to recall locked out employees). Neither the General Counsel nor the Charging Party briefed this particular issue. While I have found that certain of the activity alleged in fact occurred and the Respondent did violate Section 8(a)(1) of the Act, such does not mean the Respondent thereby also violated Section 8(a)(5). The General Counsel has alleged, in effect, a derivative violation of Section 8(a)(5), a conclusion I decline to reach. Though a bargaining order is sometimes appropriate to remedy violations of Section 8(a)(1), *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), by violating Section 8(a)(1) the Respondent does not breach its duty to bargain. In any event, to find such a derivative violation would add nothing to the remedy here. Accordingly, I shall recommend that this subparagraph of the complaint be dismisssed.

6. Refusing to meet after August 5

It is alleged that on various dates from and after August 5 the Respondent refused to meet with the Union in violation of Section 8(a)(5). First, the General Counsel contends that when the negotiation session of August 5 ended, the Company refused to meet again until after Labor Day or for a period of some 5 weeks. The Respondent maintains that it was the union negotiators who stated an inability to meet again until the week immediately preceding Labor Day, a week during which Jacobs had a prior bargaining commitment.

Concerning the delay after August 5, both the parties brought forth conclusionary statements, the record being unclear precisely what the status of future meetings was to be after August 5. However, it is agreed the August 5 meeting was adjourned subject to the call of the mediator. As of August 5 there appeared to be a substantial deadlock. Absent any definitive evidence that the Union requested meetings thereafter, I cannot conclude that the allegation with regard to the Company's refusal to meet between August 5 and Labor Day is supported by the evidence.

Following the lockout of August 13, on a number of occasions one of the Union's International representatives, Thelma McConnell, along with the Union's president, Raymond Cox, asked Mellema if he would meet with the union negotiatiors. Further, there is testimony that on August 13, in a telephone conversation, Warnke asked Mellema to meet directly with the Union. Similarly, at the August 5 meeting union negotiators asked that Mellema be present.

On all these occasions, the Union's request that Mellema be present during negotiations was denied on grounds that the Company's negotiators had full authority to agree to and execute a collective-bargaining agreement. It may be the Union's negotiators were dissatisfied with the composition of the Company's bargaining team and felt that they would have better luck dealing directly with Mellema. However, the Union has no right to insist on any particular composition of the Company's bargaining team. And absent evidence that the Company's negotiators did not have full authority to negotiate and execute a collective-bargaining agreement, I conclude the refusal of Mellema tc meet the Union was not violative of the Act.

On October 1, Cox wrote Mellema asking that negotiations resume on October 7, 8, or 9. He sent copies of that letter to Jacobs, the Commissioner, and others. Apparently having received no reply, Cox wrote again on October 9 requesting negotiations resume on October 19 or 20, again sending copies to Jacobs, the Commissioner, and others. Again having received no response, Cox wrote on October 26 requesting negotiations resume on November 3, 4, or 5, with copies to Jacobs, the Commissioner, and others. On November 9, 13, and 18 there was an exchange of correspondence concerning the Union's "unconditional offer" for the locked out employees to return to work. But there was no response to the demand to resume negotiations. Then on December 11 Jacobs wrote the Commissioner, stating, inter alia, that the Employer did not respond to Cox's letters because

"No direct request" for a meeting was made to him. Further it was his understanding that any future meetings would be called by the Commissioner.

An employer's duty to bargain requires that it approach collective-bargaining negotiations with the same seriousness of purpose it would attend to any important business matter. Here the Company's refusal even to correspond with the Union after October 1 with regard to continuing collective-bargaining negotiations evidences rejection of that principle. Cox may have breached protocol in writing to Mellema with a copy to Jacobs, but such is scarely justification for the Respondent to ignore its obligation to meet on request. I believe that the Company's refusal to meet with the Union at reasonable times and places after October 1 or even to answer the Union's letters shows an intent to delay and frustrate the collective-bargaining process. Such was violative of Section 8(a)(5) of the Act. E.g., *Imperial Tile Co.*, 227 NLRB 1751 (1977). While the Respondent did subsequently meet with the Union in January 1982, the 3-month delay after the Union had requested bargaining does not render moot this violation of the Act.

7. Unilaterally altering wages

It is alleged that without bargaining with the Union, the Company changed the wage rates when it hired replacements for the locked out employees. Thereby the Company violated Section 8(a)(5) of the Act.[8]

On January 20, 1982, Jacobs submitted a letter to the Union giving the hiring date and present pay rate, with a notation indictating classification, of each bargaining unit employee. Comparing this document with the June 11 employee roster shows that Jim Angel, a locked-out employee, earned $8.50 an hour as a photo mechanic operator and was replaced by John Klein at $10 an hour. Inasmuch as the parties had not discussed the pay rate for any classification, hiring a replacement employee at a rate greater than that earned by the individual being replaced amounts to a unilateral change in pay. The Respondent thus violated Section 8(a)(5) of the Act.

While there is some indication that non-locked out employees in the bargaining unit received wage increases in June 1981 and January 1982, there is no allegation that such was violative of the Act. Nor do I consider that the matter has been fully litigated inasmuch as there was minimal testimony concerning it and not every pay increase necessarily presupposes a violation of the Company's obligation to bargain. Nevertheless, I do conclude that there is sufficient evidence to support the allegation that the Respondent unilaterally granted wage increases by hiring replacements at pay rates greater than those which had been established. In bypassing the Union in this respect the Respondent violated Section 8(a)(5). E.g., *NLRB v. Katz*, 369 U.S. 736 (1962).

[8] The Charging Party also contends that certain wage increases were given to bargaining unit employees who were not locked out, however, such was not alleged in the complaint to be a violation of the Act. Accordingly no findings will be made concerning this matter.

D. *The Lockout*

The principal issue in this matter concerns lockout of employees on August 13 and the Respondent's failure to recall them upon receiving the Union's "unconditional offer" of November 9. The General Counsel and the Union contend that the employees locked out had been engaged in activity protected by the Act—meeting to discuss how to counter the Company's many unfair labor practices.

The Respondent contends that the lockout of August 13 was a lawful reaction to employees' unprotected activity of having engaged in intermittent or quickie strikes. And to leave work in order to have a union meeting is not protected activity.[9]

Without question employees have a protected right to withhold services from an employer, whether to protest unfair labor practices or for other reasons, such as to enhance their bargaining position. Employees may not be discharged or otherwise discriminated against for engaging in concerted work stoppages to protest working conditions. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

However, the scope of protected employee activity is not without limits. Thus in *Gulf Coast Oil Co.*, 97 NLRB 1513 (1952), instead of reporting for work, the employees attended a union meeting and came in 3 hours late. The Board concluded that this activity was not protected because it amounted to "an unwarranted usurpation of company time by the employees to engage in a sort of union activity customarily done on nonworking time."

On the other hand, in *Washington Aluminum*, it was held that a spontaneous work stoppage by employees to protest an existing adverse working condition (the extreme cold) was protected and the employees could not be disciplined for having done so. In *Washington Aluminum* the Supreme Court pointed out that there was no bargaining representative or any established procedure to handle their grievance. And in *Robertson Industries*, 216 NLRB 361 (1975), also relied on by the General Counsel and the Union, employees engaged in a work stoppage to protest a heavy workload but returned to work after they had been threatened with discharge. They then contacted a union and subsequently a number of them left work to discuss their work-related complaints with the union. The Board concluded that the second absence from work to attend the union meeting was "to find a way to resolve work related problems," and the Respondent discharged those who left work in order to "rid itself of employees" who engaged in concerted activities. The Board noted the two work stoppages were not intermittent strikes.

However, where employees participate in intermittent work stoppages, they are not protected. *Pacific Telephone & Telegraph Co.*, 107 NLRB 1547 (1954). There "the in-

[9] The Respondent contends that when the employees walked out August 6, 7, and 13 after inking their presses and without taking appropriate preventive measures, there was potential damage to equipment. Unit employees however contest this assertion. In any event, there is no evidence that in fact there was any damage to the Respondent's equipment or any economic loss to the Respondent other than that which might normally be expected from a lawful strike.

tention of the Union was to bring about a condition that would be neither strike nor work. We do not think this sort of conduct, although concerted, is entitled to the protection of the Act." Id. at 1549. Though the objective was lawful, the method was not protected, because intermittent work stoppages transgress the bounds of a genuine strike. Similarly, employees may not attempt to dictate the terms and conditions of employment by, for instance, refusing mandatory overtime. *John S. Swift Co.*, 124 NLRB 394 (1959); *Lake Development Management*, 259 NLRB 791 (1981).

Thus the question here is whether leaving work on August 6, 7, and 13 is more analogous to the facts in *Washington Aluminum* and *Robertson* or to those of *Gulf Oil, Pacific Telephone, Swift*, and *Lake Development*. I conclude that this situation is controlled by the latter cases.

First, the employees here were in fact represented by a Union which had been conducting collective-bargaining negotiations. The purpose in their leaving work on August 6, 7, and 13 was not to find a way to resolve some immediate, adverse, and undesirable working condition as was the case in *Washington Aluminum* and *Robertson*. Rather they left work in order to discuss ways in which to resolve their bargaining dispute with the Company.

The General Counsel and the Union maintain that the purpose of the meeting was to protest the employer's unfair labor practices and was caused in substantial part by those practices. That is, the Company's acts resulted in the parties not reaching a collective-bargaining agreement. But even if the employees had gone on strike August 6, it is immaterial whether such would have been considered an unfair labor practice strike. There is no issue here concerning the employees' loss of status as employees, as in *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). Nor is the distinction between economic and unfair labor practice strikers for purposes of reinstatement applicable.

Here, if employees had the right to engage in the activity they did, they had that right regardless of whether it was to protest the Company's unfair labor practices or to achieve some other end. If, on the other hand, their concerted activity was unprotected, their purpose does not change the unprotected nature of the act.

Beyond this, it is clear from the notice that the August 6 meeting was called to discuss "the current contract negotiations." The Union undertook to have unit employees meet with union representatives during normal working hours. Further, on August 6, only the first-shift employees met in the morning. The second-shift employees did not come to the meeting then, when they were off work. Rather, a second meeting was held for second-shift employees during their working time. There is simply no evidence in this record to support the contention that the only available time for employees to engage in concerted activity was during working hours. They did not have a right under the Act to come and go as they pleased. They were entitled to strike. But they were not entitled to walk out and return and to engage in this activity repeatedly. The employees established a pattern of intermittent partial strikes. For this their employer had the right under the Act to discipline them if it choose. *G K Trucking Corp.*, 262 NLRB 570 (1982).

Here the employees' third walkout (or fourth if August 6 counts for two) should be contrasted with a single, spontaneous walkout dealt with in *Polytech, Inc.*, 195 NLRB 695 (1972). There the Board held that such a single walkout is presumptively protected and "such presumption should be deemed rebutted when and only when the evidence demonstrates that the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer." Here a pattern of recurrent walkouts had been established.

On returning to work from their second (or third) walkout on August 7, the employees were warned that any future acts of this type could result in further discipline. This was a lawful warning. On these facts the Respondent could reasonably believe the employees had decided to meet periodically on company time. And when they walked out again on August 13 the Respondent reasonably locked them out until such time as they would agree not to engage further in intermittent partial strikes. This was a lawful restriction to place on continued employment.

Since the employees' activity was unprotected, discipline of them could be on any level chosen by the Company. The Company could have warned them, as it did on August 7, or could have discharged them. It chose instead to lock them out pending agreement that they would cease such activity. The Respondent did not thereby engage in any unfair labor practice. Nor did it violate the Act in not reinstating them. It is noted that the Union never indicated to the Company, even when requesting the employees be reinstated, that they would not engage in further intermittent partial work stoppages. Thus whatever rights the employees may have had to be reinstated had they agreed to cease the unprotected walkouts, no such offer was made.

Citing *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965), and subsequent cases, the Charging Party contends this was an unlawful offensive lockout which reached only union supporters, and was therefore violative of Section 8(a)(3). I conclude the facts do not support this analysis. Certain employees were barred from working on August 13 because they had left their jobs that morning. However labeled, the Respondent's act was disciplinary and not to support a bargaining position nor to get rid of union supporters.

The Charging Party argues that K. C. Jones was unlawfully locked out even if the others were not because he attended only one meeting on company time. I conclude that by participating in only one of several walkouts he associated himself with the intermittent activity. Thus the Respondent could lawfully discipline him as the others.

Different, however, is the situation of employees on the second shift, who had walked out on August 6 but not thereafter and one employee who also had walked out on August 6 and 7 but was on vacation on August 13. They did not leave work on August 13 as had the

first-shift employees, neither did they report for work on August 13 when the second shift was due to start or, in case of the vacationing employee, on the day his vacation was to have ended. There is no reason to believe that the second-shift employees would have been locked out on August 13 had they in fact come to work. Similarly, there is no indication that the vacationing employee would not have been allowed to return to work had he reported.

Alternatively, the General Counsel and the Charging Party argue that employees joined their fellow employees and became strikers to protest the termination of others. Thus even if the lockout was lawful, these individuals had a protected right to protest the Company's action by striking. I agree. In *Pepsi Cola Bottling Co. of Miami*, 186 NLRB 477 (1970), the Board stated, "However, a strike to protest even a nondiscriminatory discharge is itself protected concerted activity." See also *John S. Swift Co.*, supra.

Thus, I conclude that when David Mann, Frank Roberts, Kenneth Hickman, David Sinclair, and Phillip Sajtar aligned themselves with the locked-out employees they became economic strikers (to protest the lockout of their fellow employees) and were entitled to reinstatement upon request if they had not been replaced. Otherwise they were entitled to recall under the provisions of *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

I do not believe they were unfair labor practice strikers. The precipitating cause of their joining the picketing was not any of the Respondent's unfair labor practices found above but the Respondent's termination of the others for having engaged in quickie strikes and this was not an unfair labor practice. But for the lockout, these five would not have struck.

The evidence is unclear as to whether or not any of these individuals in fact had been replaced or by whom. Therefore, it is appropriate to leave to the compliance stage of this proceeding the question of whether or not these employees could have been reinstated upon the Union's demand of November 1, or whether they had been in fact replaced. As to them, inasmuch as they had not engaged in the second and third work stoppages, I conclude that the offer of their reinstatement was in fact "unconditional."

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unfair labor practices found above, occurring in connection with the Respondent's business, have a substantial impact upon trade, traffic, and commerce and the free flow thereof and tend to lead to labor disputes burdening and obstructing commerce within the meaning of Section 2(6) and (7) of the Act.

V. THE REMEDY

Having concluded that the Respondent has engaged in various unfair labor practices, including failing to meet at reasonable times and places with the Union to negotiate a collective-bargaining agreement, I shall recommend that it cease and desist therefrom and take certain affirmative action deemed necessary to effectuate the policies of the Act. I shall also recommend that the initial year of certification begin when the Respondent commences to bargain with the Union in good faith. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). And I shall recommend that the Respondent be ordered to offer immediate reinstatement to David Mann, Frank Roberts, Kenneth Hickman, David Sinclair, and Phillip Sajtar, if they were not permanently replaced, to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment and make them whole for any loss of wages or other benefits they may have suffered as a result of the Respondent's failure to recall them after November 1, 1981, in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided for in *Florida Steel Corp.*, 231 NLRB 651 (1977).[10] For those who were permanently replaced prior to November 1, 1981, the Respondent will place them on a preferential hiring list and recall them in accordance with the procedures set forth in *Laidlaw Corp.*, supra.

On the foregoing findings of fact and conclusions of law and on the entire record in this matter, I issue the following recommended

ORDER[11]

The Respondent, Embossing Printers, Inc., Battle Creek, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising employees that it would grant them benefits if they did not select the Union in a Board-conducted election.

(b) Telling employees that they would not be promoted because the Union had been certified.

(c) Telling an employee that he would not receive a pay raise because the Union had been certified.

(d) Implying to employees they would receive benefits should they cease to support the Union.

(e) Telling employees that the Respondent would never sign the collective-bargaining agreement with the Union.

(f) Failing and refusing to grant wage increases to employees because of their support of the Union.

(g) Bargaining directly with employees concerning their wages and other working conditions.

(h) Granting wage increases without prior notice to or negotiations with the Union.

(i) Unilaterally changing contract language previously agreed to in collective-bargaining negotiations.

(j) Failing and refusing to meet with the Union at reasonable times to conduct collective-bargaining negotiations.

(k) Unilaterally changing the wage rates.

[10] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[11] If no exceptions are filed as provided by Sec. 102.46 of the Boards Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(l) Prematurely effectuating a disciplinary system to which only tentative agreement had been reached in collective-bargaining negotiations.

(m) Failing to reinstate on request employees who are engaged in a lawful strike.

(n) In any other matter interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[12]

2. Take the following affirmative action.

(a) Recognize and bargain with the Union as the duly certified representative of a majority of its employees in the appropriate unit described above with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody such an agreement in a written, signed contract. The certification year is to begin from the date of compliance with this Decision.

(b) Meet with the Union as the certified collective-bargaining representative of employees in the appropriate unit described above at reasonable times and places to negotiate a collective-bargaining agreement.

(c) Reinstate David Mann, Frank Roberts, Kenneth Hickman, David Sinclair, and Phillip Sajtar to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment and make them whole for any loss of wages they may have suffered as a result of the Respondent's failure to reinstate them upon request on or about November 1, 1981, if at that time they had not been replaced, or to reinstate them when a vacancy occurs, in accordance with the provisions in the remedy section above.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Expunge from employees' personnel files any written warnings given them pursuant to premature inplementation of the tentatively agreed-to discipline system.

(f) Strike from any tentatively agreed-to contract clause that language which the Respondent unilaterally added.

(g) Post at Battle Creek, Michigan, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that all allegations of unfair labor practices not found herein are dismissed.

[12] Though many of the allegations in the complaint are dismissed, the extensive nature of the Respondent's unfair labor practices, particularly including delay in meeting to consummate a collective-bargaining agreement, indicate a sufficient proclivity to violate the Act that the broad injunctive relief seems appropriate. See *Hickmott Foods*, 242 NLRB 1357 (1979).

[13] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."